IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THE CITY OF PORT TOWNSEND, WASHINGTON,
Plaintiff in Error
—vs.—
THE FIRST NATIONAL BANK OF CENTRAL CITY, COLORADO,
Defendant in Error.

No. 2833

Petition for Re-hearing

U. D. GNAGEY,
Port Townsend, Washington,

L. B. STEDMAN,
Seattle, Washington,
Attorneys for Plaintiffs in Error.

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Now comes the Plaintiff in Error by its attorneys U. D. Gnagey and L. B. Stedman, and deeming itself aggrieved by the judgment of this court affirming the judgment of the district court, entered January 31, 1916, petitions for a re-hearing and a reversal of said judgment.

We hereby certify that the foregoing petition is, in our judgment, well grounded and is not interposed for delay.

U. D. Gnagey,
L. B. Stedman,
Attorneys for Plaintiff in Error.

GROUNDS OF PETITION.

The only ground for the petition that we desire to present is that the court erred in affirming the judgment as to the amount and form. The court should have modified the judgment so that the plaintiff in error will not be compelled to pay compound interest in order to satisfy the same. The judgment should further distinctly state that it is payable only out of the Indebtedness Fund.

The court in its opinion did not pass upon our contention that the judgment is erroneous by virtue of the fact that on its face it compels the city to pay compound interest which is expressly prohibited by our statute.

ARGUMENT.

For the purpose of this petition we wish to refer to our argument on the third and fourth assignment of error, pages 19 to 24 of our original brief.

This action is brought for the avowed purpose of obtaining a writ of mandamus to compel the city council to make a levy for the Indebtedness Fund so that relator's warrants may be paid at the proper time; and this court on a former writ of error sustained a demurrer to the complaint for want of sufficient facts, because the complaint did not allege facts sufficient to entitle plaintiff to the writ if it were in a court of the State.

The matter of securing damages against the defendant because of its omission to levy a proper tax is not within the issues raised by the pleadings, yet it appears in some way an effort is made to obtain damages against the city for this alleged neglect.

A mandamus proceeding under our law is not an action to recover money or personal property. In the case of State ex rel. Dudley v Daggett, 28 Wash. 1, 5, the Supreme Court of Washington says: "But while it [mandamus] is an action at law, within the meaning of the word 'action' as used in the constitution, it cannot be said to be a 'civil action at law for the recovery of or personal property.' * * The complainant, under our statutes, in such an action, seeks to obtain a command from a court of law di-

rected to an inferior tribunal, corporation, board or person, to compel the performance of an act which the law especially enjoins as a duty from an office, trust, or station, or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled and from which he is unlawfully precluded by such inferior tribunal, corporation, board or person.—§5755, Bal. Code." (§5755 of Bal. 1014 of Rem. & Bal., the present Code.)

"If a person injured by an official omission of a ministerial officer elects to bring an action for damages, he cannot also pursue his remedy by mandamus."—19 Am. & Eng. Ency 906.

On the other hand if he prosecutes a mandamus proceeding, he waives his action for damages.

Kendall v Stokes et al. 3 How. 87, 11 L. ed. 506.

The eighteenth finding of fact made by the lower court reads as follows:

"18. There is now due to the plaintiff from the defendant upon the warrants enumerated in the seventh finding, thirteen thousand, nine hundred fifty-two dollars, eighty cents ($13,952.80), with interest at six per cent. per year on six thousand seventy-two dollars, eighty cents ($6,072.80) thereof from February 18, 1898, and on seven thousand, eight hundred eighty dollars ($7,880.00) thereof from February 19, 1898."

Our contention is that the word due in the finding should not be taken to mean due and payable,

but simply fixing the amount of the face of the warrants in suit and fixing the amount of interest on them by reference to the per cent. or rate, and the time from which the interest runs; and that the judgment according to this interpretation should simply be a copy of the findings so far as the amount is concerned, making that part of the judgment expressing the amount read as follows:

"It is adjudged that the First National Bank of Central City, Colorado, the plaintiff, do have and recover from the city of Port Townsend, the defendant, the sum of Thirteen Thousand, Nine Hundred Fifty-two Dollars and eight cents ($13,952.80) together with interest at six per cent. per year on Six Thousand Seventy-two Dollars and eighty cents ($6,072.80) thereof from February 18, 1898, and on Seven Thousand Eight Hundred Eighty Dollars ($7,880.00) thereof from February 19, 1898, etc."

We further contend that the whole judgment including interest should be made expressly payable out of the Indebtedness Fund so that there can be no further question on this particular point.

These warrants, if valid, were the result of a compromise agreement. They were to be paid out of a certain fund and the warrant holders should be limited to this fund. This agreement is embodied in the resolution passed by the city council, record pp 144 and 145, and the acceptance by the judgment creditors, record pp 145 and 146. It makes a great difference to the city whether these warrants must be paid out of the Indebtedness Fund or the Current Expense

Fund. The Current Expense Fund is also limited in its levy and is barely sufficient now to carry on the city government. If the city would have to pay this judgment out of the Current Expense Fund (the general fund of the city) it would cripple its finances to such an extent that it could not carry on its government.

That we are right in our contention that the city cannot in this action be compelled to pay a larger sum than the face of the warrants and simple interest, although, as it now appears, the city did not do its duty in regard to the levying of taxes for the Indebtedness Fund for a number of years past, is, we think, clearly shown by the case of State ex rel. Polson v Hardcastle, 68 Wash., 548, cited on page 21 of our original brief.

The warrants in suit, however, must be destinguished from the warrants involved in the Polson action, supra. The warrants involved in the Polson case were of the same kind as those mentioned in Stipulation 25, record page 160, as general fund warrants, of which it was stipulated that there were $31,-150.70 outstanding on Feb. 1, 1898, but the principle involved so far as this particular point is concerned is the same. The court in the Polson case at page 556 says: "The record shows that, from January 1 to May 1, 1910, funds more than sufficient to pay relator's warrants received by the city from licenses, fines, penalties and forfeitures, were wrongfully diverted to

the current expense fund; that the relator has been wronged by the continual unlawful acts of the city; that had the city officials performed their duties according to law, his warrants would have been paid, and that no other warrant holder has proceeded against the city. The relator, therefore, contends that he should be first entitled to enjoy the fruits of this litigation by having his warrants paid from the current expense fund to which such receipts have unlawfully been diverted, and that such payment should be made forthwith even though prior general fund warrants are still outstanding and unpaid. This contention cannot be sustained. Section 3947, Rem. & Bal. Code directs that:

"All county, school, city and town warrants shall be paid according to their number, date and issue, and shall draw interest from and after their presentation to the proper treasurer: Provided, that no compound interest shall be paid directly or indirectly on any of said warrants."

"Were this an action in equity, the relator's contention, in the absence of the statute above quoted, might appeal to the conscience of the chancellor. Relator, however, has applied for a writ of mandamus to compel the maximum levy of six mills for the indebtedness fund, and also to compel payment to that fund of all receipts for licenses, poll taxes, fines, penalties and forfeitures, until his warrants are paid. He cannot seek equitable relief, nor can such relief be granted in violation of statutes upon which his rights depend. His warrants will have to be paid in their regular order from the indebtedness fund."

The court then cites section 854, 2 Dill. Mun.

Corp. (5th. ed.) the same citation we have in our original brief, showing that securing a judgment on warrants does not in any way change the priority of the warrants either of those reduced to judgment or those standing in order of payment before those reduced to judgment.

This is a state law interpreted by the state court and the U. S. court will follow this interpretation.

The third conclusion of law made by the court to which we took timely and proper exception is as follows:

"3. It was the duty of the defendant to levy a property tax to the amount of six mills on the dollar of asseesed valuation for the Indebtedness Fund, during every year beginning with 1898, and to apply the proceeds to their proper use according to law, until the warrants in suit with accrued interest were paid." —Record p 17. Exceptions to same, p 124-28.

There is nothing that we can see either in the evidence or in the findings to justify this conclusion. There was no effort made by the plaintiff to show that during all these years conditions existed which entitled it to a writ of mandate and a levy of this six mills, according to the rule laid down in State ex rel. American etc. Mortgage Co. v Mutty, 39 Wash. 624.

The record, p 155, shows the amount of taxes specially levied for the Indebtedness Fund, and at page 156 is shown the delinquent tax collections from 1898 to 1905 inclusive, but this showing leaves out of consideration the proceeds of the sale of county

property received by the city which, according to section 9 of Ordinance 722, set out in full on page 161 of the record was also paid into the Indebtedness Fund. According to the Mutty case, 39 Wash. 624, the city council under the law in question is not compelled to make the full levy of six mills each year, but there is some discretion left to the council, and each particular case must be determined on its own merits, and the burden of proof is on the plaintiff who seeks such a levy.

State ex rel. Ferguson v Grady, 71 Wash. 1 (6) as to burden of proof.

The question whether the city could have been compelled to make the maximum levy of six mills during the years it was collecting the delinquent taxes as shown on page 156 and taking in money from the proceeds of the sale of county property and applying it to the indebtedness fund is purely speculative and is not within the issues raised by the pleadings.

But even if this finding or conclusion were true, according to decision in the Polson case, just quoted, it would and could have no effect on the amount or nature of this judgment.

In view of this conclusion, it is evident that the lower court increased the judgment over and above what it should have been because, as he thought, the city council had neglected their duty for a number of years, as now appears.

It must also be remembered and taken into consideration that the city in good faith believed all these warrants invalid and acted accordingly. Some of the same series of warrants were before the Supreme Court of the state in State ex rel. etc. Co. vs. Mutty, 39 Wash. 624, in September, 1905, and in January, 1907, these same warrants were declared invalid. *State ex rel. etc. Co. vs. Tanner 45 Wash., 348 (the same case.)*

During all these years these warrant holders knew or could easily have known conditions in Port Townsend. The plaintiff held a large amount of these warrants and it certainly was strange if it did not make some inquiry which led to a proper knowledge of the facts. The bank's own evidence shows that it bought these warrants, at least some of them, as early as 1899. The very fact that no one tried to enforce payment of any of these series of warrants tended to confirm the city officers in their belief that the warrants were not only invalid, but that even the warrant holders themselves believed so.

We submit then, that this judgment should be in such an amount and in such form that by its enforcement the city would have to pay no more than if payment of these warrants were enforced in a court of this state, excluding of course, the costs of suit from such consideration.

And if the city is to be held to its contract and must pay these warrants, then the warrant holders

should also be held to their agreement, and payment of them should be limited to the source it was agreed between the parties it should be limited before these warrants were issued, and without such agreement they never would have been issued.

We think this an important matter for the city and should receive the most careful consideration of the court.

Respectfully submitted,

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L. B. Stedman,

Attorneys for Plaintiff in Error.